

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff

v.

JUSTIN ANTHONY FISHER and JOSHUA  
RAY FISHER,

Defendants

Case No.: 2:17-cr-00073-APG-EJY

**Order Denying Joshua Ray Fisher's  
Motion to Vacate, Set Aside, or Correct  
Sentence Under 28 U.S.C. § 2255**

[ECF No. 251]

Defendant Joshua Ray Fisher pleaded guilty to possession of child pornography, sexual exploitation of children, receipt of child pornography, coercion and enticement, and conspiracy to sexually exploit children. ECF Nos. 161; 162 at 1-3. I sentenced him to a total of 300 months' imprisonment. ECF No. 190 at 3. Fisher appealed. ECF No. 192. The Ninth Circuit affirmed. ECF No. 245.

Fisher now seeks to vacate his conviction and sentence under 28 U.S.C. § 2255 raising a single claim of ineffective assistance of counsel with multiple subparts. The Government responds that none of the grounds for relief have merit. I deny the petition, decline to hold an evidentiary hearing, and deny a certificate of appealability.

**I. ANALYSIS**

To prevail on a claim of ineffective assistance of counsel under § 2255, Fisher must show counsel's performance was deficient and that counsel's deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show deficient performance, Fisher must show that his "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Harrington v. Richter*, 562 U.S.

1 86, 104 (2011) (simplified). The “proper standard for attorney performance is that of reasonably  
2 effective assistance.” *Strickland*, 466 U.S. at 687. “When a convicted defendant complains of  
3 the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation  
4 fell below an objective standard of reasonableness.” *Id.* at 687-88. I review an ineffectiveness  
5 claim against the backdrop of the “strong presumption that counsel’s representation was within  
6 the wide range of reasonable professional assistance.” *Stokley v. Ryan*, 659 F.3d 802, 811 (9th  
7 Cir. 2011) (quotation omitted).

8 To establish prejudice, Fisher must show that there is a “reasonable probability that, but  
9 for counsel’s unprofessional errors, the result of the proceeding would have been different.”  
10 *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine  
11 confidence in the outcome.” *Id.* The movant thus does not prove prejudice by listing the things  
12 he thinks his attorney should have done, and then speculating that, had he done them, there might  
13 have been a different outcome. Rather, the movant must state the specific facts that, but for  
14 counsel’s deficient performance, likely would have produced a more favorable result. *James v.*  
15 *Borg*, 24 F.3d 20, 26 (9th Cir. 1994) (“Conclusory allegations which are not supported by a  
16 statement of specific facts do not warrant habeas relief.”); *Gonzalez v. Knowles*, 515 F.3d 1006,  
17 1015-16 (9th Cir. 2008) (“Gonzalez does not contend that he actually suffered from a mental  
18 illness; he merely argues that if tests had been done, and if they had shown evidence of some  
19 brain damage or trauma, it might have resulted in a lower sentence. Such speculation is plainly  
20 insufficient to establish prejudice.” (emphasis omitted)).

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1       **A. Claims Related to the *Franks* Hearing**

2       Fisher raises several claims related to the *Franks*<sup>1</sup> hearing regarding the 2016 search  
3 warrant for the search of the Burkehaven Avenue residence (the “Fisher residence”). He asserts  
4 that his counsel did not call a witness from Tumblr “who would have testified that Scott Miller’s  
5 affidavit was full of outright lies,” and that same witness “would also have established that none  
6 of the images or video were uploaded from the Fisher residence.” ECF No. 251 at 4. He likewise  
7 contends that his lawyer did not call a witness from NCMEC,<sup>2</sup> who “would have testified that  
8 Detective Miller did, in fact, falsify his affidavit to mislead the Justice of the Peace.” *Id.* Next,  
9 he asserts that his lawyer did not “bring up the fact that any ‘friend’ of the Tumblr user mcw  
10 could have uploaded content to the blog.” *Id.* Finally, he contends that his lawyer did not “bring  
11 up exculpatory facts at the Frank’s [sic] hearing.” *Id.*

12       The Government responds that I should deny these claims as mere repackaging of the  
13 claims Fisher brought on direct appeal, which he cannot relitigate through a § 2255 petition. The  
14 Government also argues that Fisher does not identify what the witnesses would have said or how  
15 their testimony would have shown that the images were not uploaded from the Fisher residence  
16 had they been called to testify. As for the allegation that counsel did not point out that a friend  
17 of Tumblr user mcw could have uploaded the images, the Government argues that issue was  
18 irrelevant at the *Franks* hearing because that hearing focused on whether the search warrant  
19 affidavit contained knowing or reckless material misrepresentations and whether the affidavit  
20 would still support probable cause if any misrepresentations were corrected. Thus, the  
21 Government contends, the issue of whether a friend could have uploaded the images was  
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23 <sup>1</sup> *Franks v. Delaware*, 438 U.S. 154 (1978).

<sup>2</sup> The National Center for Missing and Exploited Children.

1 irrelevant to whether the police had probable cause to search the Fisher residence. Finally, the  
2 Government argues that Fisher cannot show prejudice because other information showed there  
3 was probable cause for the search regardless of any alleged misrepresentations.

4 “Section 2255 may not be invoked to relitigate questions which were or should have been  
5 raised on a direct appeal from the judgment of conviction.” *Hammond v. United States*, 408 F.2d  
6 481, 483 (9th Cir. 1969). Consequently, a petitioner cannot raise in his § 2255 motion a claim  
7 that he raised on direct appeal, “absent a showing of manifest injustice or a change in the law.”  
8 *Polizzi v. United States*, 550 F.2d 1133, 1135 (9th Cir. 1976). A claim for relief is the same as  
9 one raised on direct appeal “if the basic thrust or gravamen of the legal claim is the same,  
10 regardless of whether the basic claim is supported by new and different legal arguments.” *Molina*  
11 *v. Rison*, 886 F.2d 1124, 1129 (9th Cir. 1989) (simplified). A newly raised issue is a new claim  
12 only if it “is itself a ground for relief, as opposed to being merely a supporting argument or  
13 predicate step to a larger, basic claim.” *Id.* (emphasis omitted).

14 Fisher raised on direct appeal the issue of whether I erred by denying the motion to  
15 suppress based on the argument that “the affidavit supporting the probable cause search warrant  
16 for Defendant Justin Fisher’s<sup>3</sup> residence contained material, intentionally false and/or reckless  
17 statements and omissions that misled the issuing judge.” *United States v. Fisher*, 56 F.4th 673,  
18 676 (9th Cir. 2022). The Ninth Circuit affirmed my denial of the motion to suppress because  
19 “Detective Miller’s affidavit in support of the November 21, 2016 search warrant did not contain  
20 material misstatements or omissions.” *Id.* at 683. The Ninth Circuit also concluded that Miller’s  
21 affidavit was supported by information other than the alleged misrepresentations, including  
22 “results from the July 1, 2016 Tumblr search warrant,” that supported a finding of probable  
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<sup>3</sup> Justin Fisher is Fisher’s brother who was also charged in this case.

1 cause to search the Fisher residence. *Id.* at 685. In sum, the Ninth Circuit concluded that because  
2 Fisher “fail[ed] to show that Detective Miller’s affidavit contained any material false statements  
3 or omissions (much less any such statements knowingly or recklessly made), there is no basis on  
4 which to find that the district court erred in its factfinding, or that the issuing judge was  
5 materially misled when reaching a probable cause determination.” *Id.*

6 Most of Fisher’s arguments related to the *Franks* hearing seek to relitigate whether  
7 Detective Miller made misrepresentations in his affidavit, which Fisher cannot do at this stage of  
8 the proceedings. But even if he could, he presents only conclusory and speculative statements  
9 that witnesses from Tumblr and NCMEC would have testified that Miller falsified facts in his  
10 affidavit without specifying what was allegedly false. Nor does Fisher explain how a Tumblr  
11 witness “would [] have established that none of the images or video were uploaded from the  
12 Fisher residence.” ECF No. 251 at 4. And he does not address other evidence, such as the  
13 information obtained from the Tumblr search warrant and the Cox Communications subpoena,  
14 that supported probable cause for the search warrant of the Fisher residence, regardless of any  
15 alleged inaccuracies in Miller’s affidavit. He therefore has not shown either deficient  
16 performance or prejudice resulting from counsel not calling witnesses from Tumblr and  
17 NCMEC.

18 Finally, Fisher’s arguments that his counsel should have asserted at the *Franks* hearing  
19 that “any ‘friend’ of the Tumblr user mcw could have uploaded content to the blog” and that  
20 counsel should have brought up exculpatory facts also fail. *Id.* As the Ninth Circuit stated,  
21 “Detective Miller’s affidavit, relying on the CyberTipline Report as well as the results of the Cox  
22 Communications subpoena and the Tumblr search warrant, established a fair probability that  
23 evidence of a crime will be found in a particular place—here, the Burkehaven Avenue

1 Residence.” *Fisher*, 56 F.4th at 685 (simplified). The *Franks* hearing thus addressed whether  
2 there was probable cause to support the search warrant, not whether Fisher was the person who  
3 uploaded the files or was otherwise criminally responsible. See *United States v. Perkins*, 850  
4 F.3d 1109, 1116 (9th Cir. 2017) (“To prevail on a *Franks* challenge, the defendant must establish  
5 two things by a preponderance of the evidence: first, that the affiant officer intentionally or  
6 recklessly made false or misleading statements or omissions in support of the warrant, and  
7 second, that the false or misleading statement or omission was material, i.e., necessary to finding  
8 probable cause.” (simplified)). Explanations for who might have uploaded the images or other  
9 exculpatory evidence were not at issue at that hearing. Consequently, Fisher cannot show either  
10 deficient performance or prejudice from his counsel failing to raise irrelevant issues at the  
11 *Franks* hearing. See *Sanders v. Cullen*, 873 F.3d 778, 815 (9th Cir. 2017) (“The failure to raise a  
12 meritless legal argument does not constitute ineffective assistance of counsel.” (quotation  
13 omitted)).

#### 14 **B. Civil Commitment**

15 Fisher states in his petition that his lawyer “promised the deal [he] signed would make  
16 [him] ineligible for civil commitment.” ECF No. 251 at 4. The Government responds that even  
17 assuming counsel made this type of representation, Fisher has not shown that had he known  
18 otherwise, he would have rejected the plea deal and gone to trial, so he cannot show prejudice.

19 “In the context of a plea, a petitioner satisfies the prejudice prong of the *Strickland* test  
20 where there is a reasonable probability that, but for counsel’s errors, he would not have pleaded  
21 guilty and would have insisted on going to trial.” *Smith v. Mahoney*, 611 F.3d 978, 986 (9th Cir.  
22 2010) (quotation omitted). Fisher has not stated that he would not have pleaded guilty if counsel  
23 had told him he would be eligible for civil commitment. Nor does it seem reasonably likely that

1 Fisher would have rejected the deal for this reason because going to trial also would have  
2 exposed him to the possibility of post-sentence civil commitment and because the evidence of  
3 Fisher's guilt was very strong. *See* ECF No. 162 at 21-23 (plea agreement setting forth the  
4 factual basis for the plea). I therefore deny Fisher's claim for relief on this ground.

### 5 **C. Supervised Release Conditions and the Presentencing Report**

6 Fisher states that his counsel "failed to object to supervised release conditions." ECF No.  
7 251 at 4. He also states that his counsel "failed to object to the PSR, after [he] made it plain that  
8 he wanted the PSR objected to." *Id.* The Government responds that Fisher's counsel objected to  
9 certain aspects of the PSR, so to the extent Fisher is making a generalized contention that  
10 counsel did not object to the PSR, he is incorrect. The Government asserts that if his argument is  
11 in reference to counsel's failure to object to the PSR's recommendation of supervised release  
12 conditions, then it fails because Fisher does not identify what conditions he wanted counsel to  
13 object to, and he has not shown prejudice because it is unlikely that the court would not have  
14 imposed the standard conditions, mandatory conditions, and conditions that Fisher agreed to in  
15 his plea agreement. Further, the Government notes that when asked about the supervised release  
16 conditions at sentencing, Fisher acknowledged he had read them and discussed them with his  
17 attorney, and he voiced no objection at that time.

18 Fisher's claims are conclusory. He does not identify what condition of supervised release  
19 he wanted his lawyer to object to nor does he state what grounds counsel would have had for  
20 objecting. At sentencing, I asked if there were objections to the conditions and there were none,  
21 including when I asked Fisher to confirm on the record that he had been given the terms and  
22 conditions. ECF No. 208 at 102-04. Fisher therefore has not shown deficient performance or  
23 prejudice.

1 Similarly, Fisher does not identify what in the PSR his counsel should have objected to or  
2 what grounds there were to object. At sentencing, I asked Fisher if he had a chance to read the  
3 PSR, whether he had discussed it with his lawyer, and whether his lawyer was “able to answer  
4 all of [his] questions about that report,” and Fisher answered in the affirmative. *Id.* at 7. I also  
5 asked Fisher “[o]ther than the objections that we’ll get to, are you aware of any other factual  
6 errors in the report that we need to fix?” *Id.* Fisher responded, “I am not.” *Id.* I then went  
7 through the various objections that Fisher raised and those were resolved without further  
8 argument or objection. *Id.* at 10-14. Fisher therefore has not shown deficient performance or  
9 prejudice.

#### 10 **D. Withdrawing the Plea**

11 Fisher states that his counsel “lied to [him] about his ability to withdraw[] his guilty  
12 plea.” ECF No. 251 at 4. The Government responds that Fisher has not identified the alleged lie  
13 or how he was prejudiced. It also contends that the record reflects Fisher was advised about the  
14 consequences of his guilty plea multiple times orally and in writing and that Fisher affirmed he  
15 understood. The Government argues that even if Fisher could show deficient performance, he  
16 cannot show prejudice because he has not identified a valid basis for him to withdraw his plea.

17 Fisher has not identified the alleged lie about his ability to withdraw his plea, nor has he  
18 indicated that he wanted to withdraw his plea or had any grounds on which to do so. Further, at  
19 his change of plea hearing, I advised Fisher that once he pleaded guilty it was “really, really hard  
20 to take it back.” ECF No. 207 at 4. I then engaged in an extensive discussion with Fisher and his  
21 counsel regarding his change of plea. *Id.* at 4-55. Fisher stated under oath that he was informed  
22 of the charges against him, that his attorney was able to answer all of his questions, and that he  
23 was fully satisfied with his attorney’s representation of him. *Id.* at 6-8, 12-13. I also specifically



1 questioned Fisher on whether he understood that the plea agreement's terms were not binding on  
2 me and if I decided not to follow the agreement's terms, "that would not give [Fisher] the right to  
3 withdraw [his] guilty plea." *Id.* at 38, 46. Fisher responded that he understood and that he  
4 knowingly and voluntarily entered the plea. *Id.* at 38, 41-42. Finally, I asked Fisher if he had any  
5 additional questions or concerns that he wanted to talk to his lawyer about because "next I'll call  
6 for your plea but I want to make sure you've got all the advice you feel like you need to make an  
7 informed decision. So, if you want to consult with your lawyers, feel free." *Id.* at 48. I asked  
8 Fisher if he had any additional questions for his lawyer and he said he did not. *Id.* Fisher  
9 thereafter pleaded guilty. *Id.* at 50-51. Fisher has not shown deficient performance or prejudice.

#### 10 **E. Evidentiary Hearing**

11 I need not hold an evidentiary hearing because Fisher's claims are conclusory or belied  
12 by the record. *See Shah v. U.S.*, 878 F.2d 1156, 1161 (9th Cir. 1989) ("Mere conclusory  
13 allegations do not warrant an evidentiary hearing.").

#### 14 **F. Certificate of Appealability**

15 To appeal this order, Fisher must receive a certificate of appealability from a circuit or  
16 district judge. 28 U.S.C. § 2253(c)(1)(B); Fed. R. App. P. 22(b)(1); 9th Cir. R. 22-1(a). To  
17 obtain this certificate, Fisher "must make a substantial showing of the denial of a constitutional  
18 right, a demonstration that . . . includes showing that reasonable jurists could debate whether (or,  
19 for that matter, agree that) the petition should have been resolved in a different manner or that  
20 the issues presented were adequate to deserve encouragement to proceed further." *Slack v.*  
21 *McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted). Reasonable jurists could not debate  
22 that Fisher has failed to show he is entitled to relief. I therefore deny him a certificate of  
23 appealability.

1 **II. CONCLUSION**

2 I THEREFORE ORDER that defendant Joshua Ray Fisher's motion to vacate, set aside,  
3 or correct sentence under 28 U.S.C. § 2255 (**ECF No. 251**) is **DENIED**.

4 I FURTHER ORDER the clerk of court to enter a separate civil judgment denying  
5 defendant Joshua Ray Fisher's § 2255 motion. The clerk shall file this order and the civil  
6 judgment in this case and in the related civil case number 2:23-cv-1959-APG, and then close that  
7 case.

8 I FURTHER ORDER that Joshua Ray Fisher is denied a Certificate of Appealability.

9 DATED this 24th day of January, 2025.

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13 ANDREW P. GORDON  
14 CHIEF UNITED STATES DISTRICT JUDGE  
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